No. 92-1515

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

JOSEPH ALBERICI AND THERESA ALBERICI, H/W,

Petitioners,

v.

UNITED STATES GOVERNMENT, et al.,

Respondents.

JOSEPH ALBERICI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Consolidated Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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I. COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Are there special and important reasons for granting the Petition for Writ of Certiorari requested by Petitioners Joseph and Theresa Alberici?

A. Did the Court of Appeals properly affirm the District Court's determination that Plaintiffs' claims are all barred by the applicable statute of limitations?

B. Does the Court of Appeals' affirmance of the District Court's determination that the Plaintiffs' claims are barred by the statute of limitations present substantial issues warranting an exercise of this Court's discretionary jurisdiction?

II. PARTIES TO THE PROCEEDINGS

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Petitioners

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Barry F. Lorry,
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William R. Toal, Judge
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Hugh M. Emory, Esq.
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Respondents

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V. REFERENCES TO THE OPINIONS AND JUDGMENTS BELOW

Petitioners seek review of the dismissal of their action for monetary damages. The Opinion and Order of the United States District Court for the Eastern District of Pennsylvania, dismissing the Plaintiffs' Complaint (which alleged claims of anti-trust, civil rights, RICO, and state tort law violations) is reproduced in the Appendix attached hereto as Exhibit "A". The Order of the U.S. Court of Appeals for the Third Circuit affirming the dismissal of the Complaint is attached hereto as Exhibit "B". There have been no other opinions or judgments regarding the Petitioners' action for monetary damages.

Petitioner, Joseph Alberici, also seeks review of the District Court's refusal to grant a Writ of Error Coram Nobis. The Petition for Writ stems from Mr. Alberici's prosecution and conviction for mail fraud. The District Court's Opinion denying post-trial motions is reported at 618 F. Supp. 660 (E.D. Pa. 1985). His conviction was affirmed on direct appeal to the Court of Appeals for the Third Circuit, 735 F.2d 135 (3rd Cir. 1989) (unpublished opinion) and his subsequent Petition for Writ of Certiorari was denied by this Court, 469 U.S. 1072 (1984).

Not content, Petitioner Joseph Alberici, filed a motion in the nature of a request for writ of habeas corpus, under 28 U.S.C. §2255. That petition was denied by an unpublished Memorandum and Order dated December 2, 1986. The denial of the §2255 motion was affirmed by the Court of Appeals in an unpublished Memorandum on June 25, 1987.

Respondents herein are parties to the Petitioner's action for monetary damages, only.

VI. STATEMENT OF JURISDICTION

Jurisdiction lies with this Court, pursuant to 28 U.S.C. §1254.

VII. CITATION OF RELEVANT STATUTES

42 Pa.C.S. §5523 provides, in pertinent part, as follows:

> **One Year Limitation**
>
> The following actions and proceedings must be commenced within one year:
>
> (1) an action for libel, slander or invasion of privacy.

42 Pa.C.S. §5524 provides, in pertinent part, as follows:

> **Two Year Limitation**
>
> The following actions and proceedings must be commenced within two years:
>
> * * *
>
> (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

VIII. COUNTERSTATEMENT OF THE CASE

A. Procedural History

The Respondents filing this brief are Safeguard Mutual Insurance Company ("Safeguard"), Pennsylvania Insurance Guaranty Association ("PIGA"), General Accident Fire and Life Insurance Corporation ("General Accident"), Quaker State Mutual Insurance Group ("Quaker State"), Home Mutual Insurance Company of Pennsylvania ("Home"), Duane, Morris & Heckscher ("DM&H"), Hugh M. Emory, Esquire ("Emory"), and Michael O'Hayer, Esquire ("O'Hayer"). Collectively, these parties will be referred to as the "insurers and their attorneys." Safeguard, PIGA, General Accident, Quaker State, and Home will be referred to as the "insurers," where appropriate.

Petitioners, hereafter sometimes referred to as Plaintiffs, filed their *pro se* Complaint seeking $30 million in damages on theories ranging from violation of the civil RICO statute, violation of civil rights statutes, anti-trust violations, defamation, and intentional infliction of emotional distress, on or about July 31, 1991. The gravamen of the complaint asserts that the 42 defendants conspired to ensure that plaintiff, Joseph Alberici, was falsely charged with arranging the destruction by fire of the Jerry Lewis Theatre in Aston, Pennsylvania, a theatre which Mr. Alberici was in the process of purchasing. The complaint also asserts that several of the defendants committed various improprieties in their defense of a civil suit brought by the Albericis to recover fire insurance proceeds from polices covering the theatre.

The plaintiffs are Mr. Alberici, his wife and children, and two corporations believed to be owned by, or at least under the control of, Mr. Alberici or members of his family. The 42 defendants include, but are not limited to, the federal officers and attorneys who investigated and prosecuted the mail fraud case brought against Mr. Alberici; the insurance companies which refused to pay the fire loss claims submitted by Mr. Alberici; the attorneys who defended against Mr. Alberici's civil suit to recover the insurance proceeds; various state court judges who ruled upon questions raised in Mr. Alberici's civil action, some of the attorneys who represented Mr. Alberici in his criminal case, and others.

In the District Court, each of the defendants filed motions to dismiss, for judgment on the pleadings, or for summary judgment, in response to the complaint. Defendants Cozen & O'Conner, Young Adjustment Company, Stephen A. Cozen, Bertram Horowitz, and J.B. Haas were dismissed by order dated September 25, 1991. The remaining defendants were dismissed, by virtue of the District Court's dismissal of the complaint, by order dated March 13, 1992. That order was entered on the docket on March 17, 1992. The District Judge, in his opinion, noted that an element of harassment was present in the Plaintiffs' prosecution of this action. The Court of Appeals for the Third Circuit affirmed the dismissal of the Complaint by Judgment Order dated October 6, 1992. By Order issued that date, the Court of Appeals also determined that the Plaintiffs' appeal was "frivolous within the meaning of [Fed.R.App.P] 38".

B. Factual History

In May of 1977, plaintiff Joseph Alberici entered into an agreement of sale for the purchase of the Jerry Lewis Theatre, located in Aston, Pennsylvania. The purchase price was $210,000 and title was to be taken either in Mr. Alberici's name, or by his "nominee." Mr. Alberici thereafter insured the theatre in an amount in excess of $500,000.00.

On August 6, 1977, before closing on the sale of the theatre, a fire broke out substantially destroying the building and its contents. Believing that the cause of the fire was incendiary in nature, the insurers covering the theatre refused to honor Mr. Alberici's demands for payment. Mr. Alberici, therefore, commenced a civil action in the Court of Common Pleas of Delaware County, Pennsylvania, against the insurers. Mr. Alberici's wife, Theresa, was also named as a plaintiff.

Meanwhile, the cause of the fire was a subject of interest for investigators at the FBI, as well as at the Bureau of Alcohol, Tobacco, and Firearms. Believing the fire to be similar in nature to a number of other fires that had recently occurred in several East Coast states, and which were then under investigation, these federal agencies commenced an investigation into the Jerry Lewis Theatre fire. The investigation culminated in an indictment being handed up, charging Mr. Alberici with hiring arsonists to intentionally burn the theatre, so that he could collect the insurance proceeds.

The indictment charged Mr. Alberici with mail fraud, in that he used the mails to submit proofs of loss to the

insurers which represented that the cause of the fire was "unknown to insureds." Mr. Alberici was ultimately found guilty by a jury of all six Counts of the mail fraud indictment. As a result of procedural defects, judgment and sentence were only imposed on him based on one of the mail fraud counts. However, as is obvious from the criminal record, a necessary finding for the conviction, judgment, and sentence was that Mr. Alberici had in fact procured the arson of the theatre, and had fraudulently attempted to collect the insurance proceeds.

Mr. Alberici's efforts to gain a reversal of his criminal conviction have been fruitless. On direct appeal from his Judgment of Sentence to the Court of Appeals for the Third Circuit, the Judgment was affirmed, by order dated May 15, 1984. A petition for rehearing was denied by that court, on June 14, 1984.[1] This Court denied Mr. Alberici's Petition for Writ of Certiorari, as well, on December 3, 1984. 469 U.S. 1072.

When direct attack on the conviction proved unsuccessful, Mr. Alberici turned to collateral attack. In all, Mr. Alberici has filed three motions for a new trial, a Motion under 28 U.S.C. §2252, and the presently pending Petition for Writ of Error Coram Nobis with the District Court. His third motion for new trial, alleging newly discovered evidence, was filed on January 8, 1985. His motion, pursuant to 28 U.S.C. §2255, alleging ineffective assistance of counsel, newly discovered evidence, and prosecutorial

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[1] The direct appeal to the Court of Appeals was docketed under number 83-1841.

misconduct in the form of failure to disclose exculpatory material, was filed in February, 1986.

The third new trial motion was denied by the District Court on August 9, 1985, 618 F. Supp. 660 (1985). The motion under §2255 was denied by the District Court, in an opinion dated December 2, 1986. Interestingly, District Judge Pollack's opinion denying the §2255 motion notes that Mr. Alberici argued that there was "an alleged connection between a civil case brought by defendant against his insurance carrier and defendant's federal prosecution". Apparently, Mr. Alberici contended that "the government caused the civil case to be delayed in order to avoid giving defendant access to certain evidence."

Mr. Alberici withdrew his appeal from the denial of the third new trial motion. His appeal from denial of the §2255 motion resulted in affirmance of the District Court's decision, in an opinion dated June 27, 1987.

In the civil action filed in Delaware County, a motion for summary judgment filed by the insurers was granted by Judge Labrum (a defendant herein) on October 4, 1990. The Albericis filed an appeal to the Pennsylvania Superior Court. Oral argument on the appeal was held in mid-July of 1991, approximately two weeks before this action was commenced in the District Court. The Superior Court affirmed the grant of summary judgment against Mr. Alberici, but reversed as to Mrs. Alberici, holding that she was an innocent co-insured whose right of recovery could not be impaired by her husband's fraudulent conduct. Mr. Alberici petitioned the Pennsylvania Supreme Court for permission to appeal from the Superior Court's disposition of his appeal. That permission was not

granted. Accordingly, Mr. Alberici filed his Petition for Writ of Certiorari with this Court on or about December 30, 1992. Writ of Certiorari was denied by this Court on April 5, 1993 (92-1369).

Mr. Alberici also commenced an action against his criminal defense attorneys, Nino Tinari, Esq., and Timothy Gorbey, Esq., in the Court of Common Pleas of Philadelphia County. (Mr. Tinari is named as a defendant in the pending action, though Mr. Gorbey is not.) That action, alleging legal malpractice, was docketed at December term, 1984, Number 588. Summary judgment was granted in favor of the defendant attorneys on July 15, 1987. The Pennsylvania Superior Court affirmed the grant of summary judgment on May 6, 1988. 542 A.2d 127 (1988).

IX. SUMMARY OF ARGUMENT

In this action, plaintiffs allege that there was a conspiracy against them on behalf of the United States Attorney's Office and others to obtain Mr. Alberici's criminal conviction. They also appear to assert that there was a second conspiracy by the insurance companies and their counsel in defending the civil action. The Respondents filing this brief, for the reasons that will be discussed more fully below, believe that all claims against them are totally unjustified on a factual basis. However, they also submit that there is no need for this Court to address, at any length, the underlying factual averments because the plaintiffs are clearly not entitled to a recovery under any of the theories set forth in the complaint. Moreover, since no novel, unique, or substantial issue is implicated by this case, there would be no reason for the court to

exercise its discretionary authority and grant the requested Writ.

Plaintiffs' claims relating to the alleged conspiracy to obtain the criminal conviction are barred by the various statutes of limitation. Plaintiffs' claims under the civil rights, and RICO statutes should also have been dismissed for the reason that plaintiffs have no cognizable claim under those statutes.[2] Finally, plaintiffs' state tort law claims, relating to the alleged conspiracy to defend the civil action, are barred by the doctrine of absolute judicial privilege.

X. ARGUMENT

A. Statute of Limitations

Count I of the complaint asserts a claim of violation of the civil enforcement provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. 1964. The statute of limitations for a civil RICO claim is four years. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987). Since the complaint was filed on July 31, 1991, the court must determine whether the Albericis' RICO claims accrued on or after July 31, 1987.

Count II of the complaint asserts a claim of deprivation of civil rights, presumably under color of state law,

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[2] Plaintiffs have, apparently, waived any claims they might have had under the Anti-Trust statutes. See, Brief of Appellants in the Court of Appeals, p. 4 ("Appellants are not appealing dismissal of the Antitrust claim").

in violation of 42 U.S.C. §1983. The statute of limitations for the civil rights claims would be the two year limitations period for personal injury actions found in the Pennsylvania Judicial Code, 42 Pa. C.S. §5524; *Wilson v. Garcia*, 471 U.S. 261 (1985). Thus the operative date for accrual of the civil rights action would be July 31, 1989.

Count III of the Complaint alleges a violation of the anti-trust statutes. As noted (*ante*, p. 9, n. 2). That claim has been waived.

Count IV of the complaint asserts claims under common law theories of libel, slander, and intentional infliction of emotional distress. The statute of limitations for the claims of libel and slander would be 1 year. 42 Pa. C.S. §5523, and for intentional infliction of emotional distress, it is 2 years, 42 Pa. C.S. §5524. The operative dates for accrual of these claims would therefore be July 31, 1990, for the defamation claims, and July 31, 1989, for the intentional infliction claim.

The last event alleged in the Complaint that would appear to have anything to do with the alleged conspiracy to have Mr. Alberici convicted of mail fraud was the Third Circuit's affirmance of the District Court's order denying the §2255 motion. The decision was rendered on or about June 25, 1987. (Complaint paragraph 58(s)). All the alleged impropriety with presenting evidence and witnesses at trial obviously occurred prior to or during the trial, which was held in January of 1983. It is also apparent from the record of the criminal case that Mr. Alberici was aware, in his own mind, of all the improprieties he now complains of by the time he filed his Motion for a New Trial on the grounds of newly discovered

evidence on or about January 8, 1985. (Complaint paragraph 58(p); see also, *U.S. v. Alberici*, 618 F. Supp. 660 (1985)). At the very latest, however, Mr. Alberici was award of the basis for his present claims when he filed his petition pursuant to 28 U.S.C. §2255, in February of 1986. In sum, all the claims pertaining to an alleged conspiracy to have Mr. Alberici prosecuted and convicted of the criminal charges are clearly barred by the various statutes of limitation.

The District Court agreed with this reasoning when it dismissed the complaint. On appeal, the Albericis contended that their cause of action accrued, for purposes of the statute of limitations, on the date that the Third Circuit denied rehearing on Mr. Alberici's appeal from the denial of his §2255 petition. This contention ignores clear precedent holding that a civil RICO claim accrues on the date that the plaintiff knew, or should have known that the elements of a civil RICO cause of action existed. *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988).

In this case, it is apparent that Mr. Alberici was aware of the basis for his present claims of conspiracy at least when he filed his petition under 28 U.S.C. §2255. In disposing of that petition, Judge Pollack referred to Mr. Alberici's claim that there was a connection between the prosecution of the criminal case and the defense of the action against the insurers. As is acknowledged by the Albericis in their brief to the Third Circuit in this action, it is precisely this connection which is at the heart of the current claims of RICO violation. See, Brief of the Appellants in the Third Circuit, p.13 ("the civil suit and the criminal prosecution are both separate elements of a

broader single conspiracy . . . to obtain the conviction for Mail Fraud [and] . . . preclude the said appellant from collecting the insurance proceeds." Since Mr. Alberici was alleging precisely the same conspiratorial relationship as he is presently alleging, as early as February of 1986, it is abundantly clear that he was aware of the basis for his present claims at least as of that time.

In light of Mr. Alberici's demonstrated awareness, it is apparent that all claims asserted by plaintiffs are barred. If the two year statute of limitations for civil rights violations and pendent state tort claims is applied, then plaintiffs' claims were barred on and after February of 1989. If the four year statute of limitations for civil RICO violations is applied, then plaintiffs' claims were barred on or after February of 1990. Since this action was not commenced until July 31, 1991, all of plaintiff's claims are barred.

The Albericis contend that the statute of limitations should be tolled, under the RICO statute, for the reason that they continue to suffer injury, and for the reason that the defendants allegedly continue to perpetrate RICO predicate acts. They cite *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988), in support of this proposition. This argument ignores the fact that Mr. Alberici had actual awareness of the facts he contends support his RICO claim well before July 31, 1987. Since any theory of equitable tolling of the limitations period is an exception, which extends the limitations period in situations where actual awareness is not present, it is submitted that an extension of the limitations period in this case is simply unwarranted.

Even if this court were to apply the *Keystone* rationale to the facts of this case, it is apparent that the Albericis have suffered no RICO injury within the four years preceding the institution of suit, nor have any of the defendants committed any predicate acts. Plaintiffs contend that they continue to suffer injury because the insurers, through their attorneys, continue to defend against the suit for the insurance proceeds. From a practical standpoint, this assertion is untenable. If the Albericis' contention were to be accepted by this court, then any litigant, by bringing an action and filing appeals from adverse determinations, would be accorded an unfettered opportunity to extend his limitations period merely by citing the expedient excuse that litigation continues.

The Albericis' contention that they continue to suffer a RICO injury is incorrect on purely legal grounds, as well. In essence, the claim is that the insurers' refusal to admit liability in the state court litigation constitutes a continuing injury which tolls the limitations period. It has been held, however, that as a matter of law an adversary's refusal to admit that a claim is valid will not extend the time limit for filing suit. *Anderson v. Consol-Pennsylvania Coal Co.*, 740 F. Supp. 1126 (W.D. Pa. 1990); *Firestone & Parson Inc. v. Union League of Philadelphia*, 672 F. Supp. 819 (E.D. Pa. 1987), *affirmed without opinion*, 833 F.2d 304 (3d Cir. 1987).

The claim that the limitations period should be extended because the defendants, allegedly, continue to commit predicate acts is equally unsupportable. As the District Court correctly observed in its opinion, the complaint is virtually devoid of any allegations which would

support a finding that any predicate acts have been committed. Nonetheless, on appeal, the Albericis contended that the insurers' continued defense of the civil action constitutes obstruction of justice, which is claimed to qualify as a predicate act.

Section 1961 of the RICO Act does indeed include a violation of "section 1503 (relating to obstruction of justice)" as one of the possible predicate acts upon which a pattern of racketeering could be based. However, when examined, it becomes apparent that 18 U.S.C. §1503 has absolutely no application to this case whatsoever. That statute makes it a crime to "corruptly, or by threats of force, or by threatening letter of communication" attempt to influence, intimidate or impede a variety of judicial and prosecutorial officers.

Nowhere in the complaint, nor in the Albericis' appellate brief, is it alleged that any of the defendants attempted to influence any judicial or prosecutorial officer at any time after July 31, 1987. As such, the Albericis' claims of continuing predicate acts must be rejected. The Albericis' claims are therefore barred, in their entirety, and the District Court's dismissal of the complaint was properly affirmed. There is no sound reason calling for this Court to review those decisions.

B. Absolute Privilege/State Tort Claims

As noted above, Mr. and Mrs. Alberici filed a civil action in the Court of Common Pleas of Delaware County seeking recovery of insurance proceeds that they claim covered the movie theatre. It should come as no surprise

that the insurance companies denied coverage because of the nature of the fire and the ultimate indictment and conviction of Mr. Alberici.

The defense of defendant, Safeguard, was initially undertaken by defendant, Barry Goldstein, Esquire. The defense of the other insurance companies was initially undertaken by the firm of Cozen & O'Connor (a defendant herein), which subsequently entered an appearance for Safeguard as well. In the early 1980's, Safeguard became insolvent, and Safeguard's obligations, subject to statutory provisions, were taken over by the Pennsylvania Insurance Guaranty Association (PIGA). PIGA retained the undersigned firm, defendant, Duane, Morris & Heckscher, to represent its interests. Shortly thereafter, a conflict developed in the Cozen firm, and Duane, Morris took over the defense of all the insurance companies in the Delaware County action.[3]

The acts of alleged impropriety concerning the Alberici's civil case are outlined in paragraphs 76 through 83, and 86 of the complaint. These paragraphs concern statements made by counsel for the insurance companies in pleadings, motions, or briefs, as well as matters allegedly not included with such items. The insurance companies and their defense counsel are absolutely privileged from liability for the matters complained of in these paragraphs of plaintiffs' complaint.

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[3] Defendants Emory and O'Hayer are attorneys affiliated with Duane, Morris & Heckscher and are primarily responsible for defending the insurers in the Albericis' state court suit to recover the insurance proceeds.

Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the District Court was required to apply Pennsylvania law to plaintiff's tort claims. Pennsylvania law is now well established that all communications pertinent to any stage of a judicial proceeding are accorded an absolute privilege that cannot be destroyed by abuse. *Binder v. Triangle Publications, Inc.*, 442 Pa. 319, 323, 275 A.2d 53, 56 (1971); *Accord: Greenberg v. Aetna Insurance Co.*, 427 Pa. 511, 514, 235 A.2d 576, 577 (1967); *Barto v. Felix*, 250 Pa. 252, 266, 378 A.2d 927, 929 (1979). This privilege exists in favor of counsel so that counsel will be permitted to represent the clients' interests to the fullest extent. *Binder v. Triangle Publications.* All persons involved in judicial proceedings are encouraged by the privilege to speak frankly and argue freely without concern that they may be required to defend their statements in a later defamation action. Although it is possible that "wrong may at times be done to a defamed party, it is *damnum absque injuria*. The inconvenience to the individual must yield to a rule for the good of the general public." *Yearsley v. Franklin Lamp Manufacturing Co.*, 97 Pa. Super. 538, 540 (1929) (quoting, *Kemper v. Fort*, 219 Pa. 85, 94, 67 A. 991, 995 (1907)).

Whether the privilege exists is a question of law for the court. *Montgomery v. Dennison*, 336 Pa. 255, 265, 69 A.2d 520, 525 (1949); *Rankin v. Beleef*, 206 Pa. 27, 31, 211 A.2d 56, 58 (1965); *Medico v. Time, Inc.*, 409 F. Supp. 268, 272 (E.D. Pa. 1980), *aff'd*, 643 F.2d 134, *cert. denied*, 454 U.S. 36, 102 S.Ct. 139, 70 L.Ed.2d 116 (1981).

The privilege extends beyond statements made in documents filed with the court. In fact it extends to all

communications relating or ancillary to the prosecution and defense of legal actions.

> The purpose for which the privilege exists cannot fully be achieved by limiting the privilege to structured or formal proceedings. To permit an attorney to best serve his client, the privilege must be broad enough to include occasions when a client's cause is advocated under less formal circumstances. Thus the privilege extends to and includes preliminary demands, as well as informal conferences and negotiations, conducted after litigation has been commenced or when litigation is seriously contemplated. 'It is, on the whole, for the public's interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech, in conducting the causes, and advocating and sustaining the rights, of their constituents; and this freedom of discussion ought not to be impaired by numerous and refined distinctions.'

Smith v. Griffiths, 327 Pa. Super. 418, 476 A.2d 22 (1984) (*quoting, Sriberg v. Raymond*, 370 Mass. 105, 345 N.E.2d 882, 884 (1976)).

In *Smith v. Griffiths*, plaintiff Smith was an attorney involved in divorce proceedings with his wife. He filed a civil action against Rees Griffiths, the lawyer representing Smith's wife in the marital action. Smith contended that Griffiths had defamed Smith on two occasions, the first being a series of letters written by Griffiths to the court appointed master hearing Mrs. Smith's petitions for alimony, alimony *pendente lite*, counsel fees and costs. Griffiths stated, in these letters, that Smith had not paid counsel fees and expenses as previously agreed, had

leased the marital domicile and appropriated the rent received to his own use; and had failed to pay real estate taxes on the marital property, as a result of which the property was to be listed for a tax sale.

The second alleged instance of defamation occurred when Griffiths allegedly slandered Smith by stating that Mrs. Smith was distraught because Mr. Smith had failed to pay support orders previously entered. These statements were allegedly made in the chambers of the judge issuing the support order, during an unrelated pretrial conference attended by both Smith and Griffiths.

The trial court sustained preliminary objections in the nature of a demurrer to the complaint on the ground that the communications were privileged, and therefore not actionable. The Pennsylvania Superior Court affirmed on appeal. In reaching this decision, the Superior Court noted the long standing rule that counsel is to be accorded an absolute judicial privilege for oral statements made in connection with the prosecution or defense of legal actions. As was noted by the Superior Court, the salutary purpose of this rule is to insure that counsel are encouraged to speak frankly and argue freely without danger or concern of being required to defend statements in a later defamation, or other, action.

Since the statements made by the defendant in *Smith* were not included in formal filings with the court, but instead were informal communications related to a pending legal action, the issue to be decided by the Superior Court was whether or not the privilege was to be extended to such informal communications. The Superior Court determined that only by extending the privilege to

informal communications related to judicial proceedings could the interests for which the rule was created (i.e., encouraging full, frank, and uninhibited advocacy) be protected. Since the Court determined that the privilege would be extended to all related communications, 476 A.2d 22, at 25, it affirmed the lower court's grant of demurrer in favor of defendant Griffiths.

Since the great majority of the acts complained of in the complaint relate to statements made by counsel for the insurers in documents filed with the court in the defense of the Alberici's claim for insurance proceeds, it is apparent that defendants are entitled to an absolute privilege for those statements.

There are also general allegations of unspecified, improper conduct between counsel and the Delaware County Court, but nothing independent of the judicial process whereby the insurance companies moved for and obtained Summary Judgment. Accordingly, the conduct complained of by way of these general allegations is also privileged.

The only other specific allegation of impropriety pertaining to the defense of the insurance companies is a reference to a letter of October 19, 1990. Because plaintiffs did not include this letter with the Complaint, the insurers and their attorneys attached a copy of it as Exhibit "A" to their Answer to the Complaint. As can be seen by the letter, it was addressed to plaintiff's counsel in the Delaware County action and was written shortly after the Court's Order entering Summary Judgment in favor of the insurers.

Prior to that time, the insurers had made an offer of $72,500.00 to settle Mrs. Albericis's claim. That offer was initially made by correspondence dated October 12, 1987 and had been kept open until the October 19, 1990, correspondence to the Albericis' counsel, which simply advised that the previous offer of settlement had been withdrawn. The October 12, 1987 correspondence is Exhibit "B" to defendants' Answer.

Respondents submit that, on its face, this correspondence clearly does not justify the characterization of "extortion," as is alleged by plaintiffs. (Complaint, paragraph 86 A). Furthermore, they submit that in view of its nature, the stage of the civil action at that time, and the fact that it was addressed to the Albericis' counsel, the defense of privilege applies to any claims that might arguably be based on the sending of the letter. In light of the clear holding in *Smith v. Griffiths* that the judicial privilege extends to communications which are ancillary to a pending legal action, there can be no doubt that defendants are privileged from liability for the actions complained of in the plaintiffs' complaint.

Both the District Court and the Court of Appeals agreed with the foregoing analysis of this narrow issue of Pennsylvania tort law. Their treatment of this limited question need not be reviewed by this Court.

C. Failure to State a Claim/RICO

Petitioners attempt to state a cause of action for violation of the RICO statute, 18 U.S.C. §1964. The complaint fails to state a cause of action in this regard, however, due to the failure to plead the existence of a

racketeering "enterprise" separate from the alleged "pattern of racketeering activity."

As was noted by this Court in *U.S. v. Turkette*, 452 U.S. 576 (1981), in order to secure a conviction under RICO, the government must prove both the existence of an "enterprise" and a connected "pattern of racketeering activity." As the court went on to state:

> The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise . . . The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages.

Id. at 583 (footnote omitted).

In this case, the plaintiffs' complaint alleges only the various acts carried out by some of the defendants. Plaintiffs do not (and probably can not) allege that the 42 defendants named somehow collaborated in a separate "enterprise" which carried out the "pattern of racketeering" of which they complain. The absence of such an allegation is fatal. *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786 (3d Cir. 1984). Because of the failure to allege a separate "enterprise," plaintiffs' allegations of racketeering violations are fatally defective, requiring that the allegations be dismissed for failure to state a claim, as a matter of law.

D. Failure to State a Claim/Civil Rights Act

The Complaint fails to state a cause of action, and accordingly was properly dismissed, due to the fact that it fails to allege any facts which would support a conclusion that the insurers and their attorneys deprived plaintiffs of a constitutional or statutory right under color of state law. The failure to indicate that Petitioners have been deprived of a statutory or constitutional right by defendants, as state actors, is fatal to their claim. *Howard v. Pine Forge Academy,* 678 F. Supp. 1120 (E.D. Pa. 1987).

Petitioners cannot successfully argue that these private parties, insurers and their attorneys, acted in concert with state officials. They have pled only vague and conclusory allegations asserting that there was an "agreement and conspiracy" to convict Mr. Alberici in Federal Court and a conspiracy with other defendants to have the state court action for insurance proceeds dismissed. Plaintiffs do not, and cannot, allege that the defendants, private litigants and their counsel, were state actors. The mere fact that defendants were litigants, standing alone, is insufficient to constitute an allegation of "action under color of state law". The truth of this proposition is established by consideration of its alternative. If the activities of a private litigant and its counsel were, *per se,* considered to be state action, then disappointed litigants would be free to assert claims of §1983 deprivation of civil rights whenever a judge is persuaded by the prevailing party to render a decision adverse to the losing party. This, obviously, is not the case. *See, Celano v. Celano,* 537 F. Supp. 690 (E.D. Pa. 1988).

Petitioners have failed to allege and establish any facts to support the conclusion that these Respondents agreed or conspired with state officials to wrongfully convict plaintiff Alberici, and have similarly failed to establish that these Respondents acted under color of state law in defending the claims stated by Mr. and Mrs. Alberici in their civil action for recovery of insurance proceeds. As such, Count II of plaintiffs' Complaint failed to state a cause of action. Its dismissal by the District Court was proper. The affirmance by the Third Circuit was correct. There is no substantial issue requiring review by this Court.

XI. CONCLUSION

The District Court properly dismissed the Albericis' Complaint, and the Third Circuit properly affirmed. The actions complained of in the Complaint, even if they are assumed to be actionable (a point which the insurers and their attorneys do not concede) are clearly barred by all the applicable statutes of limitations.

The claims of common law tort violations were also properly dismissed, as to the insurers and their attorneys, as the defendants are clearly accorded an absolute judicial privilege. The District Court was properly affirmed in this regard.

Finally, since the Complaint fails to set forth cognizable causes of action for violation of the RICO and civil rights statutes, those counts of the Complaint were properly dismissed. Affirmance in this regard was proper as well.

There is no substantial issue in this case requiring review by this Court. In fact, the Court of Appeals correctly observed that this case was "frivolous". The Petition for Writ of Certiorari should be denied.

DUANE, MORRIS & HECKSCHER

BY: EDWARD GRIFFITH
EDWARD GRIFFITH
Attorneys for Defendants, Safeguard Mutual Insurance Co., PA Insurance Guaranty Assn., General Accident Fire and Life Ins. Corp., Quaker State Mutual Group, Michael O'Hayer, Hugh M. Emory, and Duane, Morris & Heckscher

APPENDIX

Exhibit A*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH ALBERICI and THERESA ALBERICI, Husband and Wife, et al.,	:	Civil Action
Plaintiffs,	:	No. 91-4870
vs.	:	
UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE, et al.	:	
Defendants	:	

MEMORANDUM AND ORDER[1]

(Filed Mar 16, 1992)

VAN ANTWERPEN, J. MARCH 13, 1992

This action, filed against forty-three defendants, including the United States Justice and Treasury

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*Any typographical and/or incorrect punctuation found in the following Appendix pages were left intentionally to show accurately how the original documents appeared.

[1] Defendants Cozen & O'Connor, Stephen A. Cozen, Bertram Horowitz, J.B. Haas, and Young Adjustment Company moved to dismiss the claims against them on the grounds that plaintiffs failed to state a claim upon which relief could be granted, and that any cause of action alleged in the complaint was barred by the applicable staute of limitations. Finding the claims against these defendants to be so meritless and untimely as to be almost frivolous, we dismissed the above-named defendants without a written opinion on September 25, 1991. This memorandum supplements those dismissal orders as well as the order attached hereto.

Departments, various federal and state officials and judges, attorneys, insurance companies, and other individuals and businesses, represents the latest development in Joseph Alberici's continuing efforts concerning a crime he was convicted of in 1983. The Complaint alleges a vast conspiracy among all the named defendants, with the object of securing the ruin of Plaintiffs' businesses and reputations, and the conviction of federal mail fraud and incarceration of Plaintiff Joseph Alberici. Plaintiffs attempt to state claims under 18 U.S.C. § 1962[2], the Racketeer Influenced and Corrupt Organizations Act ("RICO"); 42 U.S.C. § 1983, for civil rights violations; 15 U.S.C. § 1, for a conspiracy in restraint of trade (the "antitrust claims"); and under the common law of Pennsylvania, for the torts of libel, slander, and intentional infliction of emotional distress. Jurisdiction in this Court is based on 28 U.S.C. § 1331, 18 U.S.C. § 1964, and 15 U.S.C. §§ 15 and 25.

Each of the defendants in this action has filed a motion to dismiss, for judgment on the pleadings, or for summary judgment, and Plaintiffs have filed briefs in response.[3] We now dispose of all of those motions.

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[2] Plaintiffs do not specify in their complaint under which subsection of § 1962 they are suing. Since subsections (c) and (d) seem to be the only possibly applicable portions of the act, we will assume that plaintiffs intend to claim under those subsections.

[3] We note that, although Plaintiffs initially filed the Complaint in this action *pro se*, on behalf of himself and others, all plaintiffs are now represented by an attorney. Plaintiffs' attorney has not seen fit to amend or supplement either the Complaint or any other papers filed without counsel in this matter.

BACKGROUND

The Complaint in this case alleges that Joseph Alberici was indicted and convicted of mail fraud in the United States District Court for the Eastern District of Pennsylvania in 1983. The mail fraud conviction was based on evidence that Alberici planned the arson of the Jerry Lewis Theater in Aston, Pennsylvania and hired people to set the fire in order to collect the insurance.[4] Although a jury found Alberici guilty on six counts of mail fraud, the Court vacated all but one count. On September 9, 1983, Alberici was sentenced to a term of imprisonment of twenty months. After several fruitless appeals, including a Petition for Writ of Certiorari to the Supreme Court of the United States, on January 8, 1985 Alberici filed a motion for a new trial on the grounds of newly discovered evidence. After granting him ten hearings between January 21 and February 21, 1985, in which to produce this claimed new evidence, the District Court denied the motion on August 9, 1985. Alberici's last appeal was disposed of when, on June 27, 1987 the Third Circuit Court of Appeals upheld the conviction. Complaint ¶ 58.

The Complaint also refers to a lawsuit filed by Joseph Alberici in the Pennsylvania Court of Common Pleas for Delaware County, Civil Action #78-10515, in which Alberici sought to recover the insurance proceeds for the building he burned down from five of the defendants in

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[4] Alberici, through his nominee, La Casa Mia, Inc., had contracted to purchase the building shortly before the fire, and had insured the building for $525,000. Complaint ¶ 58(H).

this action, Safeguard Mutual Insurance Company, General Accident Fire and Life Insurance Co., Ltd., Insurance Placement Facility, Quaker State Mutual Group, and Home Mutual Insurance Company of Pennsylvania (the "insurance company defendants"). It appears from the Complaint that that lawsuit was not finally resolved until October 4, 1990, when Defendant Judge Joseph LaBrum entered summary judgment for the defendant-insurers.

The forty-four page Complaint details Alberici's objections to various pieces of evidence at the criminal and civil trials, and his disagreements with the judges' rulings and his opponents' arguments. He claims that the parties and judges violated several procedural rules, and that several witnesses at the trials lied. The prosecutors called surprise witnesses and deceived the court into believing that Alberici was guilty. They held secret "ex parte" meetings with the investigating agents and the aggrieved insurance companies who were the victims of the mail fraud.

Alberici also objects to the investigative methods of the B.A.T.F. agents. Alberici complains that the federal authorities have no business investigating an arson case because arson is a state crime (Complaint at ¶ 62) and that they had the outrageous gall to subpoena Alberici and other witnesses and interrogate them in front of a grand jury. Not only did the defendant-agents subpoena Alberici's business records, but they persuaded other people to cooperate in the investigation "without authority or justification." *Id.* The Complaint also states that Defendants Barry Lory, Dennis Dutch, Stephen Wehner and Joanne Epps removed certain exculpatory documents from his case file, altered or destroyed other documents,

and that the prosecutors fabricated "all the mail fraud documents of evidence used against Defendant Joseph Alberici." Complaint at ¶ 67.

The allegations regarding the civil case are limited to false statements in pleadings and motions, violation of the Pennsylvania Rules of Civil Procedure, and erroneous rulings by the judges involved.

STANDARD OF REVIEW

A. Motions to Dismiss and for Judgment on the Pleadings

The familiar Rule 12(b)(6) criteria apply to the disposition of the motions to dismiss.[5] In reviewing the sections of the complaint attempting to state claims against these defendants, we accept as true all factual allegations and all reasonable inferences that can be drawn therefrom, *Unger v. National Residents Matching Program*, 928 F.2d 1392, 1395 (3d Cir. 1991), and we view them in the light most favorable to Plaintiffs, the non-moving parties, *Mortensen v. First Federal Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). We may dismiss the claims against these defendants only if it is clear that no relief could be

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[5] The pleadings are closed and factual matters outside the pleadings have not been submitted. Therefore, the standard of a Fed. R. Civ. P. 12(b)(6) motion to dismiss will be applied to the Motion for Judgment on the pleadings under Fed. R. Civ. P. 12(c) filed by the insurance company defendants (Docket item #24). *Republic Steel Corp. v. Pennsylvania Engineering Corp.*, 785 F.2d 174, 182 (7th Cir. 1986); *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1038 (6th Cir. 1979); *Harris v. WGN Continental Broadcasting Co.*, 650 F.Supp. 568 (N.D. Ill. 1986).

granted under any set of facts that could be proved consistent with the allegations. *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984).

B. Motion for Summary Judgment

The federal government parties[6] have filed a Motion for Summary Judgment rather than a 12(b)(6) motion. The Rule 56 standard applies. The court shall render summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). And issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). A factual dispute is "material" only if it might affect the outcome of the suit under governing law.[7] *Id.* at 248, 106 S.Ct. at 2510. All inferences must be drawn and all doubts resolved in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994 (1962); *Gans v.*

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[6] United States Government, Department of Justice, former Assistant United States Attorneys Peter F. Vaira, David R. Strawbridge, Luther E. Weaver, Stephen V. Wehner, and Joanne A. Epps, the Department of the Treasury, and Special Agents Barry F. Lory and Dennis E. Dutch of the B.A.T.F.

[7] Pennsylvania law provides the rules of decision in this case under *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

Mundy, 762 F.2d 338, 341 (3d Cir. 1985) *cert. denied* 474 U.S. 1010, 106 S.Ct. 537, 88 L.Ed.2d 467 (1985).

On motions for summary judgment, the moving parties bear the initial burden of identifying for the court those portions of the record that it believes demonstrate the absence of material fact disputes. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). To defeat summary judgment, the non-moving parties – Plaintiffs, in this case – must respond with facts of record that contradict the facts identified by the movant, and may not rest on mere denials. *Id.* at 321 n.3, 106 S.Ct. at 2552 n.3 (quoting Fed. R. Civ. P. 56(e)); *see First National Bank of Pennsylvania v. Lincoln National Life Insurance Co.*, 824 F.2d 277, 282 (3d Cir. 1987). The non-moving party must demonstrate the existence of evidence that would support a jury finding in its favor. *See Anderson*, 477 U.S. at 248-49, 106 S.Ct. at 2510-11.

Since there is no evidence whatsoever in the record in this case – no affidavits, no depositions, no interrogatory answers – we will assume that Defendants admit as true for the purpose of this motion all well-pleaded facts in the Complaint, and treat this motion essentially the same as a motion to dismiss. The Defendants are entitled to judgment if it is clear from the facts in the Complaint that Defendants are entitled to relief as a matter of law.

DISCUSSION

A. RICO claims

In *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156, 107 S.Ct. 2759 (1987), the Supreme Court decided that the limitations period for actions

brought under the civil enforcment provision of the Racketeer Influenced and Corrupt Organizations Act is the four year period for Clayton Act actions. *Agency Holding* did not reach the issue of when this limitations period starts, but the Third Circuit Court of Appeals has held that it

> runs from the date the plaintiff knew or should have known that the elements of a civil RICO cause of action existed, unless, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur which are part of the same pattern. In that case, the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity.

Keystone Ins. Co. v. Houghton, 863 F.2d 1125 (3d Cir. 1988).

It is obvious from the face of the complaint that Plaintiffs' RICO claims are barred because they were not brought within four years of the date on which the limitations period began to run. *See Cleveland v. Berkson*, 878 F.2d 1034, 1036 (7th Cir. 1989) (RICO and civil rights complaint properly dismissed where complaint makes it clear that the acts complained of took place more than four years before complaint filed). The allegations necessary to support a RICO claim by a private plaintiff under 18 U.S.C. § 1962 are (1) the conducting of, (2) an enterprise, (3) through a pattern, (4) of racketeering activity, and (5) injury to the plaintiff's business or property. *Id.* at 1128, citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 3285 (1985). A "pattern" requires at least

two acts, and "racketeering activity" means any one of those predicate offenses listed in 18 U.S.C. § 1961(a)(1).

At best, the Complaint attempts to allege two separate plots against the plaintiffs, one centered around the criminal prosecution and one consisting of the insurance companies' and their attorneys' defense of Alberici's civil suit in state court. There are absolutely no allegations regarding the civil suit conspiracy that even come close to alleging an illegal RICO conspiracy. The allegations of manufacturing and suppression of evidence in the criminal prosecution come closer to a valid RICO claim, but they all occurred in the late 1970's and early 1980's, much more than four years before the filing of the Complaint. While it is difficult to judge when Plaintiffs first discovered that a cause of action existed in a case like this one, where it is patently obvious that Plaintiffs in fact have no cause of action, we can state with certainty that they knew or should have known of all of the facts and speculations alleged in the Complaint at the very latest by the time of Alberici's January 8, 1985 motion for a new trial based on supposedly newly discovered evidence.

Nor do Plaintiffs fit within the exception which extends the starting date for the limitations period when there are further RICO injuries or predicate acts. *See Keystone Ins. Co. v. Houghton, supra.* There has been no RICO injury or predicate act within the last four years in either the criminal prosecution plot or the civil suit defense plot.[8] In fact, the only thing alleged in the complaint to have happened within the last four years took

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[8] We do not mean to imply that the Complaint alleges any RICO predicate acts which occurred more than four years ago.

place in the state court action C.A. #78-10515 when the Defendants answered Alberici's motion for summary judgment and made a cross-motion for summary judgment, and Judge LaBrum granted the defendant's motion. Filing motions and receiving a favorable judicial result are not predicate acts under the RICO statute, nor does Plaintiff's loss of a lawsuit that has been pending for fourteen years, and whose result was necessesarily determined by the Plaintiff's 1983 criminal conviction, constitute further RICO injury.

In sum, we find that any RICO claims which Plaintiffs could have proved against these defendants are barred by the four year statute of limitations. By resting our decision on the statute of limitations, we do not intend to discount the numerous other defenses and complaint deficiencies raised in Defendants' motions. In the interest of conserving judicial resources, we will not discuss these other defenses at length, but will merely note that the Complaint fails to allege a RICO enterprise or enterprises, fails to allege any predicate acts sufficient to constitute a pattern of racketeering activity, and fails to overcome the judicial and prosecutorial immunities of many of the defendants and the res judicata effect of the judgments against Joseph Alberici in both the District Court and the Pennsylvania Court of Common Pleas.

We have not been able to detect a single allegation of a RICO predicate offense, let alone the two offenses required to form a pattern, in the entire Complaint.

B. § 1983 Claims

Claims under 42 U.S.C. § 1983 are subject to the state statute of limitations for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261, 280 105 S.Ct. 1938, 1949 (1985). Since all complained-of acts took place in Pennsylvania, it is appropriate here to apply Pennsylvania's two year statute of limitations for personal injury actions, found at 42 Pa.Cons.Stat.Ann. § 5524 (Purdon's 1991 Supp.). *Bougher v. University of Pittsburgh*, 882 F.2d 74, 78 (3d Cir. 1989); *see also Fitzgerald v. Larson*, 769 F.2d 160, 162 (3d Cir. 1985). Accordingly, plaintiffs' claims are time-barred if the claims accrued before July 31, 1989.

Unlike under the RICO action accrual rule in *Keystone Insurance*, supra, in a § 1983 action the date of accrual is the date on which plaintiffs knew or had reason to know of the injury that constitutes the basis of this action. *Deary v. Three Unnamed Police Officers*, 746 F.2d 185, 197 (3d Cir. 1984). Here, from the face of the complaint we can ascertain that Plaintiffs must have known of the injuries relating to the criminal prosecution of which they complain by the date of Joseph Alberici's criminal conviction in 1983. *See Syre v. Commonwealth of Pennsylvania*, 662 F.Supp. 550, 553-54 (E.D. Pa. 1987), aff'd 845 F.2d 1015 (3d Cir. 1988), *cert. denied* 488 U.S. 853, 109 S.Ct. 139 (1988) (plaintiff's § 1983 and RICO claims against numerous defendants for allegedly conspiring to prosecute him accrued on the date of his criminal conviction). The § 1983 claims based on the criminal prosecution, and the claims for actions by the civil suit defendants which took place before July 31,

1989, are thus barred by the statute of limitations unless there is some basis for tolling the limitations period.[9]

Plaintiff Alberici argues that the limitations period must be tolled under the doctrine of fraudulent concealment. Federal law permits tolling the § 1983 statute of limitations where plaintiffs allege facts showing that "defendants concealed the conduct complained of, and that plaintiffs failed, despite the exercise of due diligence on its part, to discover the facts forming the basis of [their] claim." *Commonwealth of Pennsylvania v. Lake Asphalt & Petroleum Co.*, 610 F.Supp. 885, 887 (M.D. Pa. 1985).

In order to take advantage of this tolling principle, plaintiffs must allege (1) defendants' wrongful concealment of their actions, (2) failure of the plaintiffs to discover the operative facts or the basis of their causes of action within the limitations periods; and (3) plaintiff's due diligence until discovery of the facts. *Bethlehem Steel Corp. v. Fischbach and Moore, Inc.*, 641 F.Supp. 271, 273 (E.D. Pa. 1986). Wrongful concealment consists of specific affirmative conduct of defendants which would, under the circumstances of this case, lead a reasonable person to believe that he or she did not have a claim for relief. Silence or passive conduct of defendants is not deemed fraudulent absent some special relationship between the parties which imposes a duty of disclosure upon the defendants. *Pennsylvania v. Lake Asphalt & Petroleum Co.*, 610 F.Supp. at 888, citing *Rutledge v. Boston Woven Hose*

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[9] We discuss the allegations regarding more recent events in the civil suit below.

and Rubber Co., 576 F.2d 248 (9th Cir. 1978). In addition, the Federal Rules of Civil Procedure require that "in all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." Fed.R.Civ.P. 9.

Nowhere in the Complaint do Plaintiffs claim that the conduct complained of was concealed from them, or that they only found out about it recently. Moreover, even if we assumed that Plaintiffs just discovered the operative facts the day before they filed it, there is no attempt to allege due diligence in attempting to uncover there claims in the years since the conduct took place. Plaintiffs here have failed to allege facts supporting a fraudulent concealment theory, and so their claims are barred by the statute of limitations.

The Complaint does allege that several events took place within the two years before this action was initiated. In 1990 the insurance company defendants and their attorneys filed an answer to Joseph Alberici's Motion for Summary Judgment in Civil Action 78-10515, and in 1991 they filed a brief with the appellate court in that action. Judge Joseph LaBrum entered an order in October, 1990 disposing of that lawsuit, and supplemented that order with an opinion in February, 1991. By no stretch of the imagination could these acts give rise to a cause of action under § 1983.

In order to state a claim against a private party, such as the insurance companies and their attorneys in this case, under § 1983, a plaintiff must allege that the private party willfully participated in a joint action with a state official. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90

S.Ct. 1598, 1605 (1970). This participation can be found in a conspiracy or agreement between a judge and a private citizen to deprive someone of a federal right, but it must go beyond a judge simply "agreeing" with one party and disagreeing with another in rendering his decision in a case. *Celano v. Celano,* 537 F.Supp. 690, 694-95 (E.D. Pa. 1982), citing *Sparkman v. McFarlin,* 601 F.2d 261, 262 (7th Cir. 1979) (Fairchild, J., concurring). "Otherwise, counsel could state a cause of action under section 1983 whenever a judge was persuaded by the prevailing party to render a decision adverse to the losing party." *Celano v. Celano,* 537 F.Supp. at 695. There is no allegation in this case that the winning parties in civil action 78-10515 bribed Judge LaBrum, or otherwise compromised the judge's independence and usurped his official power. *See Id.; see also Dennis v. Sparks,* 449 U.S. 24, 28, 101 S.Ct. 183 at 186 (1980) (private parties who bribe judge acting under color of state law).

"[J]udges defending against § 1983 actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities." *Dennis v. Sparks,* 449 U.S. at 27, 101 S.Ct. at 186 (citations omitted). The complaint in this action fails to state a claim against Judge LaBrum, or, in fact, against any of the judge-defendants, because all of the alleged acts of those defendants were performed in their judicial capacities.

Just as we noted in discussing the RICO count, we acknowledge here that Defendants have stated numerous valid defenses and objections to the complaint besides the statute of limitations ground. The Complaint does not sufficiently allege that the non-state actors acted under color of state law. It does not overcome the traditional

privilege granted to pleadings in judicial proceedings, it relies on facts which have already been decided against Plaintiffs in other judicial decisions which must be given preclusive effect, nor does it overcome judicial and prosecutorial immunities of many of the defendants. It is sufficient, however, to dismiss the Complaint for untimeliness without discussing these defenses in detail.

C. Antitrust Claims

Plaintiffs' Count III attempts to state a general claim under "the Anti-Trust Laws of the United States, including, but not limited to, 15 U.S.C. § 1." 15 U.S.C. § 15b sets out a four year statute of limitations for such antitrust claims.[10] "Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research,* 401 U.S. 321, 338, 91 S.Ct. 795, 806 (1971). In the case at bar, the only conceivable business injury of which plaintiffs may be complaining is the 1980 closing of Studio 19 and La Casa Mia, Inc. The complaint alleges no such injury in the last four years, and thus the limitations period began to run more than four years ago.

In an attempt to evade the statute of limitations, plaintiff Alberici repeats his argument that the doctrine of equitable tolling for fraudulent concealment applies to his antitrust claims. As we noted above, Plaintiffs have

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[10] "Any action to enfoce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. . . ."

not alleged any facts which could support such a claim, and so Count III must fail.

D. State Law Claims for Libel, Slander and Intentional Infliction of Emotional Distress

Libel and slander are subject to a one year statute of limitations in Pennsylvania. 42 Pa. Con. Stat. Ann. § 5523 (1). Other intentional torts, such as intentional infliction of emotional distress, are subject to a two year statute of limitations. 42 Pa. Con. Stat. Ann. § 5524(7). There is no claim that Defendants concealed the allegedly slanderous statements in this case, or that Plaintiffs did not know of them, and so the limitations period will not be tolled. Thus, Plaintiffs' claims for acts occurring before July 31, 1989 are time-barred.

As noted above, the only acts alleged after July 31, 1989, consist of statements made in pleadings and judicial opinions in civil action 78-10515. Pennsylvania accords an absolute privilege to all communications pertinent to any stage of a judicial proceeding. *Binder v. Triangle Publications, Inc.*, 442 Pa. 319, 323, 275 A.2d 53, 56. Thus, it is apparent from the face of the Complaint that Plaintiffs' claims based on those pleadings and opinions must be dismissed.

CONCLUSION

It is apparent from the face of the Complaint that, in spite of a large number of allegations, Plaintiffs have not stated a single claim for relief. Furthermore, given the large number of defendants, the nature of most of the

defendants, and the history of this matter, an element of harassment is present. We would not hesitate to allow Plaintiffs to plead over if we had any reason to believe that a well-founded action could be stated, but that is clearly not the case. Accordingly, we will dismiss the Complaint with prejudice as to those defendants moving to dismiss, and we will do the same for those defendants moving for summary judgment or judgment on the pleadings.[11] An appropriate order follows.

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[11] Defendant David Soltz has filed a letter which we will treat as a Motion to Dismiss.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH ALBERICI and THERESA ALBERICI, Husband and Wife, et al.,	:	Civil Action No. 91-4870
Plaintiffs,	:	
vs.	:	
UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE, et al.	:	
Defendants	:	

ORDER

AND NOW, this 13th day of March, 1992, upon consideration of the Motions for Summary Judgment, Motions for Judgment on the Pleadings, and Motions to Dismiss filed by the Defendants in this case, and having carefully considered Plaintiffs' replies to those motions, it is hereby ORDERED that each of the defendants' motions is GRANTED, and the Complaint is DISMISSED WITH PREJUDICE. Accordingly, Plaintiffs' Motion for Default Judgment against David Soltz, filed January 30, 1992, is DENIED AS MOOT. This case is CLOSED.

BY THE COURT

/s/

Franklin S. Van Antwerpen, J.

Exhibit B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1258

JOSEPH ALBERICI; THERESA ALBERICI, Husband and wife; LA CASA MIA, INC., STUDIO 19; VINCENT ALBERICI; ELIZABETH ALBERICI (LA FAUCI); THERESA O'DONNELL

V.

UNITED STATES GOVERNMENT; DEPARTMENT OF JUSTICE; PETER F. VAIRA, ESQUIRE; DAVID R. STRAWBRIDGE, ESQUIRE; LUTHER E. WEAVER, ESQUIRE; STEPHEN V. WEHNER, ESQUIRE; JOANNE A. EPPS, ESQUIRE; DEPARTMENT OF TREASURY; BARRY F. LORY; DENNIS E. DUTCH; COMMONWEALTH OF PENNSYLVANIA; DEPARTMENT OF STATE POLICE; ATTORNEY GENERAL; WILLIAM L. DI GIAMBERDINI; DELAWARE COUNTY, PENNSYLVANIA; GEORGE T. LEWIS; KENNETH J. BOYDEN, ESQUIRE; SAFEGUARD MUTUAL INSURANCE CO.; BARRY J. GOLDSTEIN, ESQUIRE; PA. INSURANCE GUARANTY ASSOC., GENERAL ACCIDENT FIRE AND LIFE INSURANCE CORP., LTD.; INSURANCE PLACEMENT FACILITY OF PENNSYLVANIA; J. KENNETH IVORY; QUAKER STATE MUTUAL GROUP; HOME MUTUAL INSURANCE COMPANY OF PENNSYLVANIA; COZEN & O'CONNOR; STEPHEN COZEN, ESQUIRE; YOUNG ADJUSTMENT CO.; BERTRAM HOROWITZ; ULMER & CO., INC.; THEODORE TEPLICK; JOSEPH T. LA BRUM, JR., JUDGE; RITA E. PRESCOTT, JUDGE; WILLIAM R. TOAL, JR., JUDGE; NINO V. TINARI, ESQUIRE; DAVID A. SOLTZ, ESQUIRE;

DUANE, MORRIS & HECHSCHER; HUGH M. EMORY, ESQUIRE; MICHAEL O'HAYER, ESQUIRE; LEONARD TRIGGIANI, SR.; LEONARD TRIGGIANI, JR.; BOROUGH OF DARBY, PENNSYLVANIA; THOMAS J. POWERS; J.B. (JOYCE BROWN) HAAS

Joseph Alberici,

Appellant

Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 91-04870) District Judge: Hon. Franklin S. Van Antwerpen

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Submitted Under Third Circuit Rule 12(6)
October 1, 1992

Before: SLOVITER, *Chief Judge*,
GREENBERG and GARTH,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed. Costs taxed against appellant.

By the Court,

/s/ Delores K. Slouiter
Chief Judge

Attest:
/s/ Sally Mrvos
Sally Mrvos, Clerk

Dated: OCT 6 - 1992

Costs taxed in favor of Borough of Darby & Thomas J. Powers as follows:

Brief $214.90

Costs taxed in favor of Toal, Prescott, Labrum & Boyden as follows:

Brief $223.00

Costs taxed in favor of Comm. of Pa. State Police, Atty. Gen, et al. as follows:

Brief $66.60

Costs taxed in favor of Delaware County as follows:

Brief $128.06

Costs taxed in favor of Darby Borough as follows:

Brief $133.35